CHUAH ENG KHONG

v.

MALAYAN BANKING BHD

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-615-1995]
25 JUNE 1997

CIVIL PROCEDURE: *Judgment - Judgment debt - Action on loan agreement - Payment of principal and interest*

CIVIL PROCEDURE: *Originating summons - Whether bankruptcy notice should be heard as originating summons*

CIVIL PROCEDURE: *Writ of summons - Whether action for return of title deed should be by way of writ*

This was an appeal from the judgment of the High Court dismissing the appellant borrower's application for a declaration that he was entitled to require the respondent bank to return the title deed to a house and land which the borrower had purchased from a housing developer, upon payment of the full amount of a judgment, interests and costs which the bank had obtained on a loan agreement cum assignment ('the loan agreement').

On 27 July 1983, the borrower had signed a sale and purchase agreement with a housing developer who undertook to build a house on the lot purchased by the borrower. Clause 5 of the loan agreement assigned the benefit of the sale and purchase agreement to the bank. The title was issued on 19 November 1984 which subsequently came into the possession of the bank.

The borrower defaulted in paying four monthly installments. On 10 December 1985, the bank's solicitors issued a demand for the same stating that the failure would result in court action for the recovery of the entire sum plus interests and costs. The borrower did not comply. On 7 March 1986, the bank's solicitors demanded and recalled the sum payable. Again the borrower did not comply.

Without the bank's knowledge, the borrower entered into an agreement on 3 June 1985 purporting to sell and transfer the land to one Tan Ah Tong ('TAT'). To protect his interest, TAT entered a caveat. On 3 June 1986, TAT purported to assign all his rights to one Chua Chok Kiang ('CCK'). This

transaction was also not reported to the bank. No transfer was however forwarded to the bank and the land continued to be registered in the name of the developer. In December 1987, the bank filed a writ in the Sessions Court demanding the whole outstanding sum due under the charge. The judgment recovered on 3 October 1988 was literally an order in terms except that the contractual rate of interest claimed was only allowed up to the date of the judgment.

On 12 March 1992, CCK filed a caveat ('the second caveat') against the land claiming that TAT had paid the borrower in full but that TAT had yet to transfer the land to her. On 2 November 1992, the bank applied for the removal of the second caveat. The bank contended that it was unable to register the memorandum of the charge because of the second caveat. The bank contended that CCK had no registrable interests. CCK resisted the application. The bank manager filed a further affidavit in reply in which it was stated that the purported assignment by the borrower to TAT and thereafter to CCK was a conspiracy to defraud the bank. On 4 August 1994, the bank filed a caveat. On 15 August 1994, the bank's solicitors issued a bankruptcy notice claiming the full amount due ie, 132,777.76. On 17 November 1994, the borrower tendered the amount due but the bank refused, claiming now the sum of RM241,447.31 as at 2 December 1994.

The borrower then filed an originating summons on 22 December 1994 for a declaration that the sum of RM132,177.76 represented the entire debt owing from the borrower to the bank and for the return of the title upon receipt by the bank of the amount of RM132,177.76. There were therefore now three concurrent proceedings pending ie, the caveat removal, the bankruptcy proceedings and the originating summons.

An affidavit in opposition was filed by the bank's manager, claming that RM242,396.75 had to be paid in order to obtain the release of the title deed. The difference in figures came about because the bank had calculated interest due after judgment at a contractual date, whereas interest at the rate of the judgment was fixed at 8% pa on the decretal sum as from 3 October 1988.

Held:
Per Mahadev Shankar JCA

[1] The trial judge could and should have treated the matter before him as one that concerned the validity of the bankruptcy notice only and could have directed it to be set aside upon payment of the sum stipulated therein.

[2] The bank's action in the Sessions Court was on the loan agreement and therefore against the borrower personally. The personal covenant for payment of principal and interest arising from the loan agreement was extinguished by the judgment.

[3] The appeal had to be allowed because the consequence of non-payment was that the bank would have been entitled to present a bankruptcy petition. The appeal should **not** be understood to mean that the bank was under any obligation to return the title until the parallel obligation to satisfy the charge had been fulfilled by the borrower.

[4] If the borrower wanted to discharge the judgment now, he must pay the principal and judgment interest up to the date of realisation. How the bank should go about enforcing the charge would have to await the determination of further facts.

[5] Insofar as the bankruptcy notice was concerned, it should have been heard as an originating summons whereas the claim for the return of the title should have been by writ.

[Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini merupakan rayuan dari penghakiman Mahkamah Tinggi yang telah menolak permohonan perayu untuk suatu deklarasi bahawa dia berhak meminta responden ('bank tersebut') supaya mengembalikan suratikatan hakmilik kepada rumah dan tanah yang telah dibeli oleh perayu ('si peminjam') daripada pemaju perumahan, atas bayaran jumlah sepenuhnya suatu penghakiman bersama-sama dengan faedah dan kos yang telah diperolehi oleh bank atas suatu pinjaman serta serahan hak ('perjanjian pinjaman tersebut').

Pada 27 Julai 1983, si peminjam telah menandatangani suatu perjanjian jualbeli dengan pemaju perumahan yang telah berjanji membina sebuah rumah atas bidang tanah yang dibeli oleh si peminjam. Fasal 5 perjanjian tersebut telah menyerahhak kesemua manfaat perjanjian jualbeli tersebut kepada bank. Hakmilik telah dikeluarkan pada 19 November 1984 dan telah diambil posesi oleh bank.

Sipeminjam telah gagal membayar balik empat bayaran ansuran. Pada 10 Disember 1985, peguamcara bank telah mengeluarkan tuntutan untuk bayaran tersebut dengan menyatakan bahawa kegagalan membayarbalik akan mengakibatkan tindakan mahkamah untuk mendapat kembali jumlah sepenuhnya bersama-sama faedah dan kos. Sepeminjam gagal mematuhi. Pada

7 Mac 1986, peguamcara bank telah menuntut dan menarikbalik jumlah yang harus dibayarbalik. Sekali lagi si peminjam gagal mematuhi.

Tanpa pengetahuan bank, sipeminjam telah menandatangani suatu perjanjian pada 3 Jun 1985 untuk menjual dan memindahmilik tanah tersebut kepada Tan Ah Toy ('TAT'). Untuk melindungi kepentingannya, TAT telah memfailkan suatu kaveat. Pada 3 Jun 1986, TAT telah menyerahhak kesemua haknya kepada seorang bernama Chuah Chok Kiang ('CCK'). Transaksi ini juga tidak dilaporkan kepada bank. Walaubagaimanapun, suatu pindahmilik tidakpun didaftarkan atas nama bank. Tanah tersebut telah terus berdaftar atas nama pemaju. Dalam bulan Disember 1987, bank telah memfailkan suatu writ di Mahkamah Sesyen menuntut jumlah sepenuhnya yang belum dibayar balik di bawah gadaian. Penghakiman yang diperolehi pada 3 Oktober 1988 secara literal adalah suatu perintah seperti yang dipohon kecuali bahawa kadar faedah kontrak yang dituntut debenarkan hanya pada tarikh penghakiman.

Pada 12 Mac 1992, CCK telah memfailkan suatu kaveat ('kaveat kedua') terhadap tanah menuntut bahawa TAT telah membuat bayaran sepenuhnya kepada sipeminjam dan bahawa TAT masih lagi belum memindahmilik tanah tersebut kepadanya. Pada 2 November 1992, bank telah memohon untuk membatalkan kaveat tersebut. Bank telah berhujah bahawa ianya tidak dapat mendaftarkan memorandum gadaian oleh kerana kaveat kedua itu. Bank berhujah bahawa CCK tidak mempunyai kepentingan yang boleh berdaftar. CCK telah membantah permohonan ini. Pengurus bank telah memfailkan affidavit jawapan lanjut di mana telah dinyatakan bahawa serahan hak tersebut oleh sipeminjam kepada TAT dan selanjutnya kepada CCK adalah suatu komplot untuk memfraudkan bank tersebut. Pada 4 Ogos 1994, bank juga telah memfailkan suatu kaveat. Pada 15 Ogos 1994, peguamcara bank telah mengeluarkan suatu notis kebankrapan yang menuntut jumlah sepenuh iaitu RM132,177.76. Pada 17 November 1994, si peminjam telah mengemukakan jumlah yang perlu dibayar tetapi bank telah menolak – menuntut bahawa jumlahnya sekarang adalah RM241,447.31 pada 2 Disember 1994.

Sipeminjam kemudiannya telah memfailkan saman pemula pada 22 Disember 1994 untuk suatu deklarasi bahawa RM132,177.76 merupakan hutang sepenuhnya yang dihutang oleh sipeminjam kepada bank dan untuk mengembalikan hakmilik atas penerimaan jumlah RM132,177.76 oleh bank.

Maka sekarang terdapatnya tiga prosiding bersama iaitu pembatalan caveat, prosiding kebankrapan dan saman pemula. Afidavit bantahan telah difailkan oleh Pengurus Bank, menuntut RM242,396.75 harus dibayar untuk membolehkan pengembalian suratikatan hakmilik. Perbezaan jumlah tersebut adalah kerana bank telah mengira faedahnya setelah penghakiman pada kadar

kontrak, manakala faedahnya pada kadar penghakiman telah ditetapkan pada 8% setahun atas jumlahnya pada 3 Oktober 1988.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Hakim perbicaraan boleh dan patut menganggap perkara di hadapannya sebagai sesuatu yang berkenaan dengan kesahan notis kebankrapan sahaja dan hakim boleh memerintah supaya ianya diketepikan atas bayaran jumlah yang disebutkan.

[2] Tindakan bank di Mahkamah Sesyen adalah berkenaan suatu perjanjian pinjaman, dan oleh itu adalah terhadap sipeminjam sendiri. Perjanjian persendirian untuk bayaran prinsipal dan faedah yang terbangkit dari perjanjian pinjaman telah diselesaikan oleh penghakiman.

[3] Rayuan tersebut terpaksa dibenarkan kerana akibat kegagalan membayar adalah bahawa bank akan berhak mengemukakan petisyen kebankrapan. Rayuan tersebut tidak harus ditafsirkan sebagai bermakna bahawa bank adalah dibawah obligasi untuk mengembalikan hakmilik sehingga obligasi yang selaras untuk memuaskan gadaian telahpun dipenuhi oleh sipeminjam.

[4] Jikalau si peminjam hendak melepaskan gadaian, dia hendaklah sekarang membayar prinsipal dan faedah penghakiman sehingga tarikh penghasilan. Cara bagaimana bank patut menguatkuasakan gadaian – harus ditangguhkan sehingga keputusan fakta-fakta selanjutnya.

[5] Sejauhmana notis kebankrapan itu, ianya harus diperbicarakan sebagai saman pemula manakala berkenaan dengan tuntutan untuk mengembalikan hakmilik, tindakan tersebut haruslah melalui cara writ.

[Perintah sekadarnya.]

Cases referred to:
Sim Lim Finance Ltd v. Pelandok Enterprise Pte Ltd & Anor [1981] 1 MLJ 280 ***(foll)***

Other sources referred to:
Law of Mortgage, Fisher & Lightwood, 9th edn, pp 595, 597
Merger, RR Sethu, [1988] 1 MLJ cxxvii

[Appeal from High Court Malaya, Kuala Lumpur; Originating Summons No: S1-24-1016-94]

For the appellant - Malik Imtiaz Sarwar (Karina Yong with him); M/s Vazeer, Akbar, Majid & Co
For the respondent - Chin Ling Hau; M/s Ho, Loke & Koh

Reported by Mariette Peters-Goh

JUDGMENT

Mahadev Shankar JCA:

This is an appeal from the judgment of the High Court dismissing the appellant's application for a declaration that he was entitled to require the respondent ("the bank") to return the title deed to a house and land the appellant ("the borrower") had bought from a Housing Developer, upon payment of the full amount of a judgment, interest and costs which the bank had obtained on a Loan Agreement cum assignment ("the loan agreement"). The bank had insisted on being paid the excess post-judgment interest which had accrued due to the bank at the contractual rate. The trial judge held that there was no merger of the borrower's covenant to repay principal and interest in the judgment but that the terms of the loan agreement imposed an independent covenant to pay interest at the contractual rate up to the date of repayment.

The material terms of this loan executed on 26 March 1984 were as follows:

Clause 1

(i) To repay to the lender on demand the loan together with interest thereon at the rate of twelve per centum (12%) per annum (hereinafter referred to as "the Prescribed Rate" which expression shall where the context so permits include any other rate or rates which the lender may from time to time stipulate in the manner hereinafter provided) AND until demand as aforesaid to repay to the lender the loan together with interest thereon at the Prescribed Rate by one hundred and twenty (120) equal monthly instalments of Ringgit Eight Hundred and Eighty-Five only (Ringgit 885)...

(iii) On demand to pay all such other sum and moneys as are or may become payable by the borrower under this agreement and in particular (but without prejudice to the generality of the foregoing) all the costs charges expenses and other sums and moneys mentioned in cl. 30 below.

Clause 5

For the consideration aforesaid the borrower hereby assigns unto the lender all his rights title and interest in the said lot and the full and entire benefit of the said agreement by way of security for the loan hereby granted. PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provisions of this agreement the borrower shall and hereby undertakes

to continue to observe perform and be bound by all whatsoever conditions convenants and stipulations on the part of the borrower expressed or contained in the said agreement.

Clause 8

In the event that the borrower (or where the borrower shall be more than one person if any one of them) shall:

(1) make default in payment of any one or more of the monthly instalments or any interest thereon or other sums or moneys (whether principal or interest) herein agreed or covenanted by the borrower to be paid; then and in any of such cases the loan and any interest thereon and all other sums of moneys (whether principal or interest) for the time being owing under this agreement shall immediately become payable by the borrower to the lender and the lender shall forthwith become entitled to recover the same with interest thereon at the Prescribed Rate and to exercise the rights and powers upon default herein by this agreement and by law provided without any previous notice to or concurrence on the part of the borrower.

Clause 12

Upon issue of a separate document of title to the said lot by the government the borrower shall at his own cost and expense and upon being so required to do by notice in writing from the lender take a transfer of and execute a charge over the separate document of title to the said lot such charge to be in the lender's standard form (with such variations thereof as the lender may require) in favour of the lender to secure repayment to the lender of the balance of the loan then due and all other moneys together with interest thereon at the Prescribed Rate payable and owing by the borrower to the lender under and by virtue of this agreement at the date of the execution of the charge.

Clause 13

For the considerations aforesaid the borrower hereby irrevocably appoints the Manager of the lender for the time being in Kuala Lumpur the attorney of the borrower and in the borrower's name or in the name of the attorney or other wise and on the borrower's behalf to deal with the said lot in any manner whatsoever and to enforce all rights and remedies under the said agreement and do all other things as fully and effectually as the borrower could do himself in connection therewith ...

Clause 14

This agreement shall remain in force until and unless the transfer and charge referred to in cl. 12 hereof is duly registered against the register title to the said land or the **whole of the moneys secured by the said lot together with interest thereon** and all the other moneys payable to the lender hereunder are paid in full whichever first happens. (Emphasis added)

Clause 28

So long as any moneys shall be owing by the borrower to the lender and during the continuance of this agreement the lender shall have the custody and possession of the borrower's copy of the said agreement and of all other whatsoever documents evidencing any title to or right in the said lot or any benefits or rights annexed appurtenant or relating thereto or in any way connected therewith.

The document of title ("the title") to the land was not yet in existence when the loan agreement was executed. The borrower had on 27 July 1983 signed a sale & purchase agreement with a Housing Developer, Sri Donglai Sdn. Bhd. who undertook to build a house on the lot purchased by the borrower. Clause 5 of the loan agreement set out above assigned the benefit of this sale & purchase agreement to the bank. The title was issued only on 19 November 1984 and subsequently came into the possession of the bank by virtue of cll. 12 and 13 of the loan agreement.

The borrower defaulted in paying four monthly instalments. On 10 December 1985 the bank's solicitors issued a demand for the same stating that failure will result in "Court action for recovery of the entire sum plus interest and costs". The borrower did not comply.

On 7 March 1986 a second letter followed. The bank's solicitors now demanded and recalled, "the entire loan of RM63,341.09 only plus interest and costs". Again the borrower did not comply.

In breach of the loan agreement which prohibited the borrower from dealing with the land without the consent of the bank, and unbeknown to the bank, the borrower entered into an agreement in writing on 3 June 1985, purporting to sell and transfer the land to one Tan Ah Tong. The borrower and his solicitor must have been aware that the entire interest in the land had already been assigned to the bank. It is therefore very problematic what interest, if any, could have passed from the borrower to this Tan Ah Tong. To protect his interest Tan Ah Tong filed a caveat Presentation Number 206/86 Jilid 27 Folio 106 ("the first caveat") on 8 April 1986. Furthermore since the land was subject to an express condition that it could not be dealt with without the consent in writing of the State Executive Council the efficacy of this purpoted sale is very suspect.

The mechanics whereby the bank's interests in the land were to be protected under the loan agreement cum assignment was for the borrower to send a registrable memorandum of transfer to the bank together with a memorandum of charge duly executed. The title deed, upon issue went from the developer

directly to the bank. In 1986 M/s. Michael Chen & Lee were the bank's solicitors. Lian & Co. were the borrower's solicitors. On 27 January 1986 they wrote to the bank's solicitor as follows:

27th January, 1986

Surat { Kami MBB-37-37-83
Tuan C/1875/83

M/S Michael Chen & Lee,
8th Floor, Bangunan Bangkok Bank
105, Jalan Bandar,
KUALA LUMPUR

Dear Sir/s,

Re: K118, Taman Cheras Indah
Phase 2, Kuala Lumpur.
Purchaser: CHUAH ENG KHONG

We refer to the above matter and return you herewith the duly executed Borang 16A and duly attested by our Mr. Lian for further action.

We shall forward you the duly executed Memorandum of Transfer as the same is now being forward to M/s Sri Donglai Sendirian Berhad for their execution and return, to enable us to forward the same to the relevant Stamp Office for adjudication.

Yours faithfully,

sgd.

The plain meaning of this letter is that the borrower had forwarded to the bank the charge duly executed and attested, and that the transfer from the Developer to the borrower would also be forwarded in due course.

Instead on 3 June 1986 Tan Ah Tong by a written "assignment" purported to assign all his rights to one Chuah Chok Kiang who is the borrower's sister. This transaction was also not reported to the bank. Nor was Tan Ah Tong's caveat removed notwithstanding the cessation of any further claims by him to the property.

On 5 February 1987 Lian & Co. wrote to the bank's solicitors as follows:

5th February, 1987

SURAT {Kami C/1875/83
Tuan MBB-37-83-C

M/S Michael Chen & Lee,
Advocates & Solicitors
8th Floor, Bangunan Bangkok Bank,
105, Jalan Bandar,
50000 KUALA LUMPUR

Dear Sirs,

Re: K118, Taman Cheras Indah Phase 2, KL
Purchaser: Mr. Chuah Eng Khong

We refer to the above matter and the telephone conversation with your Mr. Chandra.

We have not been able to trace the Memorandum of Transfer.

We have requested Mr. Chua Eng Khong to call at our office to execute a fresh Memorandum of Transfer.

Yours faithfully,

sgd.

Despite this no transfer was ever forwarded to the bank. The land continued to be registered in the name of the Developer.

In December 1987 the bank filed a writ in the Sessions Court Kuala Lumpur. The material portions of the statement of claim read as follows:

3. The plaintiffs claim against the defendant is for the sum of M$80,644.84 being monies payable by the defendant to the plaintiffs as at the 12th day of November 1987 for monies lent by the plaintiffs to the defendant as bankers for the defendant at his request and for interest agreed to be paid upon money due from the defendant to the plaintiffs pursuant to a loan agreement dated 26th day of March, 1984.

PARTICULARS

Housing Loan

$80,644.84 being the outstanding balance as at the 12th day of November, 1987 together with further interest thereon at the rate of 10% per annum at yearly rests and penalty interest of 1% above the current rate on the arrears of instalments from the 13th November, 1987 until full settlement.

4. Further by way of security for the abovesaid loan, the defendant by the said loan agreement dated the 26th day of March, 1984 assigned to the plaintiffs all its rights title and interests in and to the property known as Plot 118, Block K, Taman Cheras Indah, Kuala Lumpur (hereinafter called "the said property")

5. The said loan agreement provides, *inter alia,* that in the event the defendant default in the payment of any of the said instalments or any interest thereon or any other sums or moneys due and owing to the plaintiffs:

(a) the said Housing Loan and any interest thereon and all other sums or moneys due and owing becomes immediately payable to the plaintiffs.

8. By reason of the aforesaid, the whole outstanding sum due under the said charge *(sic)* became immediately due and payable by the defendant to the plaintiffs.

9. On 30th day of November, 1987 the plaintiffs through their solicitors issued another letter to the defendant recalling and demanding the payment of the full outstanding sum of 480,644.84 as at 12th November, 1987 and the delivery of vacant possession of the said property.

The prayers read:

AND THE PLAINTIFFS CLAIM:

a. the sum of M$80,644.84;

b. interest thereon at the rate of 10% per annum at yearly rests and penalty interest of 1% per annum above the prescribed rate on the arrears of instalments both calculating from 13th day of November, 1987 until satisfaction;

c. vacant possession of the said property;

d. costs of this action;

The judgment recovered on 3 October 1988 was literally an order in terms except that the contractual rate of interest claimed was only allowed up to the date of judgment. Only 8% per annum was allowed thereafter on the decretal sum until realisation.

Quite why the bank or its solicitors did not timeously pursue the transfer or seek to register the charge is not clear. On 12 March 1992 the borrower's sister Chuah Chok Kiang filed a caveat ("the second caveat") against the land claiming that Tan Ah Tong had paid the borrower in full but that Tan Ah Tong had yet to transfer the land to her. Again her solicitor was Albert S.F. Lian.

By Originating Summons 24-849-92 filed on 2 November 1992 in the High Court at Shah Alam the bank applied for its removal. (Presumably the first caveat had lapsed.) According to the affidavit of the Bank Manager affirmed on 31 October 1992 when the title to the land came out, the bank was unable to register the borrower's memorandum of charge because of the second caveat. The bank contended that Chuah Chok Kiang had no registrable interest in all the circumstances.

Chuah Chok Kiang resisted the application. Her affidavit is not before us. In a letter dated 13 January 1994 the borrower sought to mitigate his conduct by claiming that he had been unemployed but was now prepared with his sister's assistance to settle the loan by instalments. This offer must have been rejected because on 25 January 1994 the bank manager filed a further affidavit in reply in which it is stated that the purported assignments by the borrower to Tan Ah Tong and thereafter to Chuah Chok Kiong was conspiracy to defraud the bank.

On 4 August 1994 the bank also filed a caveat on the land. On 15 August 1994 the bank's solicitors issued a Bankruptcy Notice claiming the full amount due to them by way of decretal sum, interest up to 15 August 1994 and costs. The amount due came to RM132,177.76 and the Bankruptcy Notice gave the breakdown of how interest was calculated as per judgment.

On 17 November 1994 the borrower tendered through his new solicitors to the bank's solicitors the full amount claimed ie, RM132,177.76 upon terms that the bank accept the same in full satisfaction and release the said title to him. The bank refused. It required payment of RM241,447.31 as at 2 December 1994.

The borrower then filed his Originating Summons on 22 December 1994 in the High Court at Kuala Lumpur. The first prayer was for a declaration that RM132,177.76 represented the entire debt owing from the borrower to the bank under the loan agreement **AND** the judgment. The second prayer was for the return of the title upon receipt by the bank of RM132,177.76. The borrower also prayed for costs and such other relief as may be just. There were now three concurrent proceedings pending ie, the caveat removal application in the High Court Shah Alam, the Bankruptcy Proceedings in the High Court Kuala Lumpur and this Originating Summons which was supported by an affidavit of the borrower. An affidavit in opposition was filed by the bank's manager, claiming RM242,396.75 had to be paid in order to obtain the release of the title deed as at 31 December 1994.

The difference in figures came about because the bank had calculated interest due after judgment at the contractual rate, whereas interest at the judgment rate was a fixed 8% per annum on the decretal sum as from 3 October 1988.

Unfortunately the borrower's Originating Summons was very imprecise as to the consequences he was seeking to establish. The summons was not brought under the heading assigned to the Bankruptcy Proceedings ie, D2-29-1832-94. Nevertheless this was referred to as being the subject matter of the application as well as the loan agreement. The summons and the affidavit in support have been very adroitly drafted so as to exclude all reference to the charge executed by the borrower and his other misconduct in regard to the purpoted assignments and caveats all of which must have been undertaken to frustrate the bank's lawful claims. The prayers are now set out in full:

(a) bahawa pembayaran jumlah wang sebanyak RM132,177.76 dari plaintiff kepada defendan, sepertimana yang dituntut oleh defendan menerusi Notis Kebankrapan Mahkamah Tinggi Kuala Lumpur No. D2-29-1832-94, adalah merupakan penjelasan dan penyelesaian penuh hutang plaintif kepada defendan di bawah Perjanjian bertarikh 26hb Mac 1984 dan Penghakiman bertarikh 3hb Oktober 1988 di antara kedua-dua pihak;

(b) bahawa defendan memulangkan kembali Dokumen Hakmilik Sementara bagi tanah yang dikenali sebagai Daftar H.S. Mukim Ampang, No. H.S. (M) 14801, No. P.T. 5533 Lot 023815 kepada plaintif apabila menerima wang sebanyak RM132,177.76 yang tersebut di atas, tanpa apa-apa kesekatan atau hak ke atasnya;

(c) kos permohonan ini ditanggung oleh defendan

(d) lain-lain Perintah yang dianggap perlu dan bersuai manfaat oleh Mahkamah Yang Arif.

A free translation would read as follows:

(a) that full payment of RM132,177.76 by the plaintiff (the borrower) to the defendant (the bank) as claimed in the Bankruptcy Notice in the Kuala Lumpur High Court D2-29-1832-94 must be deemed to be in full settlement and satisfaction of the debt of the plaintiff to the defendant under the agreement dated the 26th March 1984 and the judgment dated 3rd October 1988 between the two parties;

(b) that the defendant return the Temporary Document of Title known as register H.S. Mukim Ampang, No. H.S. (M) 14801, No. P.T. 5533 Lot 023815 to the plaintiff upon receipt the amount of RM132,177.76 mentioned above, without any restrictions or rights on it;

(c) cost of the application to be borne by the the defendant;

(d) any other orders which are deemed fit by the learned Court.

In his judgment the learned trial judge found as a fact that the borrower had not executed the charge, when the uncontested evidence before him was that he had done so. He also said that the bank's application was to remove both caveats when in fact it was to remove the second caveat only. This error however is immaterial. What is critical is that the application to remove the second caveat was made so that the charge could be registered. Since the bank held the title deed as security its caveat (as shown in the photocopy of the title deed exhibited in the Appeal Record) is a lien-holder's caveat.

In the penultimate paragraph of his judgment the learned trial judge found that cl. 14 of the loan agreement was an independent convenant and merger does not apply because the moneys secured by the land and the interest therein at 12% per annum have not been paid in full "and the transfer and charge remain to be registered".

In point of fact para. 6 of the bank manager's affidavit of 31 October 1992 only refers to the charge. There is no reference anywhere to any transfer executed by the borrower. Nor has such a transfer (if there is one) or the charge been exhibited in the affidavits.

We heard arguments in this appeal on 30 January 1997 and reserved judgment. We gave judgment in this matter on 25 June 1997, when we allowed this appeal with costs. It does not appear to have occurred to either counsel to inform this Court that on 31 January 1997 the High Court in Shah Alam ordered the second caveat be removed. This information was material because the way is now open for the charge, which the bank holds, to be registered. However the photocopy of the title deed still shows the Developer to be the registered proprietor. So a transfer from the developer is required which may require the bank to exercise its powers as the borrower's attorney.

In addition to the authorities cited in the judgment of the Court below and to us here we think some help can be derived from the exposition in the *Law of Mortgage* (9th Edn.) by Fisher and Lightwood at pp. 595, 597. It reads as follows:

> **Effect of judgment on mortgage interest.** On the above principle a covenant in a mortgage for payment of principal is merged in a judgment obtained on the covenant and the interest runs on the judgment at the rate of 7½% per annum. See *Sewing Machines Rental, Ltd. v. Wilson* [1975] 2 All ER 553 (CA); and note the point of there being no interest on County Court judgments. If the mortgage provides for a higher rate, the right to recover the difference

between the higher rate and the judgment rate depends on the form of the covenant for payment of interest and the nature of the proceedings – whether the claim is against the mortgagor personally, or is against the mortgaged property.

If the effect of the covenant for payment of interest is to be payable so long as any principal money shall be due on the covenant for payment of principal, then it is extinguished in the judgment together with latter covenant. On judgment being obtained no principal is any longer due on the covenant since it is gone. The principal is thereforth due on the judgment. The interest covenant is considered to have this effect where it provides for payment of interest until the principal is repaid, or so long as the principal or any part thereof remains unpaid.

A covenant of this nature is said to be ancillary to the main covenant, and the excess of interest cannot be recovered in proceedings against the mortgagor personally. Where the interest covenant is not merely ancillary, but is an independent covenant, it is not extinguished in the judgment, and the excess of interest can be recovered in personal proceedings. A covenant for payment of interest so long as any principal remains due on the security is an independent covenant, since the principal is equally due on the security whether it is owing on the covenant or the judgment. Consequently under a covenant in this form the excess interest can be recovered in personal proceedings *Popple v. Sylvester* [1882] 22 Ch. D. 98. For a form of independent covenant, see p. 680 in the Appendix, *infra.* Such provision is implied in a registered charge: see Land Registration Rules 1925, 5.76.

But in proceedings in which the mortgagee's claim is against the property, the full interest recovered by the mortgage is recoverable whether the interest covenant is independent or ancillary.

It is necessary when looking at all the English authorities to keep in the forefront of our minds that there is a big difference between English mortgages where the legal estate passes to the mortgagee and charges under the National Land Code where the legal estate remains in the borrower. The term "security" must mean the instrument upon which the lender relies to enforce his claim. Thus the loan agreement would be a security. The memorandum of charge executed by the borrower is another security.

Notwithstanding an obviously erroneous reference to "the said charge" in para. 8 of the statement of claim, the bank's action in the Sessions Court was on the loan agreement alone, and therefore against the borrower personally. The personal covenant for payment of principal and interest arising from the loan agreement was extinguished by the judgment.

The Bankruptcy Notice was predicated solely upon the judgment. We therefore think that the trial judge could and should have treated the matter before him as one that concerned the validity of the Bankruptcy Notice only and could have directed it be set aside upon payment of the sum stipulated therein.

To that extent we allowed this appeal because the consequence of non-payment was that the bank would have been entitled to present a Bankruptcy Petition.

Our allowing this appeal should **not** be understood to mean that the bank is under any obligation to return the title until the parallel obligation to satisfy the charge has been fulfiled by the borrower. One of the complications in this case was that in 1986 and 1987 and up to the point when judgment was taken, the borrower who had executed the charge failed to forward to the bank the memorandum of transfer from the developer to the borrower. The full circumstances of this aspect of the matter cries out for an inquiry because the unilateral attempts of the borrower to bypass the bank by purporting to assign his rights to his sister Chuah Chok Kiang through Tan Ah Tong, taken together with their then solicitor's contention that the transfer could not be traced is suggestive of sharp practice. On the material presented to us in the Appeal Record it appears that this land is still registered in the name of the developer (see Appeal Record p. 75).

This case has some similarity with *Sim Lim Finance Limited v. Pelandok Enterprise Pte. Ltd. & Anor.* [1981] 1 MLJ 280. This is a Singapore decision. The plaintiff sued under the mortgage which provided for interest at 18%. The Court Rules only permitted 8%. The Registrar refused to grant more than 8%. On appeal Chief Justice Wee Chong Jin held that the plaintiff could not get more than 8% on the judgment, but were entitled to retain their security until they were paid the principal sum plus interest at 18%.

The defendant was not represented in that case. The question as to whether if Sim Lim Finance collected the full amount of the judgment debt, it was still entitled to bring foreclosure proceedings to enforce recovery of the balance of the debt calculated at 18% was not answered.

Likewise in our case the bank's rights to register the charge now that Chuah Chok Kiang's caveat has been removed has not been tested. In such circumstances it would be wrong for us to order the bank to return the title as prayed for by the borrower. His hands are very soiled, and specific relief is very much a discretionary remedy.

The borrower's new solicitor may be forgiven for going for a declaration in so far as it affected the Bankruptcy Notice, since the borrower's tender was conditional. The trial judge did not deal with this aspect. In our judgment an

act of bankruptcy was committed but that is now of academic interest in view of the time lapse. If the borrower wants to discharge the judgment now he must pay principal and judgment interest up to date of realisation. How the bank should go about enforcing the charge will have to await the determination of further facts.

This situations has been brought about by permitting this matter to continue in the Court below as an Originating Summons when crucial issues of fact were contested. In so far as it concerned the Bankruptcy Notice it should have been heard in that file. In so far as the claim for the return of the title was concerned the action should have been by writ. The hybridised application without consolidation of the pending claims in different courts has also contributed to the present *impasse.* In view of the importance of the issues involved this case may well be a proper one for an appeal to the Federal Court.

We may well ask ourselves:

(i) Why did the bank's solicitors not chase Lian for the transfer in 1987?

(ii) Why did the bank wait until 1992 to attack the first two caveats?

(iii) Why did the Bank wait until August 1994 to file its own caveat and issue the Bankruptcy Notice?

(iv) Why has the bank not taken any action against Tan Ah Tong, Chuah Chok Kiang and S.F. Lian for knowingly attempting to pre-empt its rights? A conspiracy, if there was one, is actionable tort.

(v) Why did the bank's solicitors did not disclose the terms of the charge in the court below?

The grey and shadowed areas of the facts in this case have compounded our difficulties in unravelling what was really going on between the parties. So far as the law is concerned it is unfortunate that neither counsel drew our attention to R.R. Sethu's excellent article on *Merger* in [1988] 1 MLJ cxxvii.

Our granting costs to the borrower here and in the court below is thus a matter for real regret which fortunately is not irremediable.

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